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THE GROUNDS OF PARDON IN THE COURTS

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Although the motives which determine in a particular case the exercise of the discretion of the pardoning power are not subject to judicial inquiry, the courts have nevertheless often found it necessary, or at least convenient, to discuss the grounds upon which pardons may be based.

"A pardon is a work of mercy;"¹ "a pardon is an act of grace."² These expressions, so often quoted by the courts, indicate the strictly legal theory of the ground of pardon. "A pardon is an act of mercy flowing from the fountain of bounty and grace. * * * Although laws are not framed on principles of compassion for guilt; yet when Mercy, in her divine tenderness, bestows on the transgressor the boon of forgiveness, Justice will pause, and, forgetting the offense, bid the pardoned man go in peace."³ "Without such a power of clemency, to be exercised by some department or functionary of a government, it would be most imperfect and deficient in its political morality, and in that attribute of Deity whose judgments are always tempered with mercy."⁴ Pardon is thus wholly a matter of grace or mercy and not of right.⁵ It "is not a right given for a consideration—but a free gift."⁶ "A pardon proceeds not upon the theory of innocence, but implies guilt. If there was no guilt, theoretically at least, there would be no basis for pardon."⁷ "The offence being

¹ 3 Co. Inst., 233.

² Marshall, C. J., for the Court, in *United States v. Wilson*, 7 Pet., 150, 160 (1833).

³ *United States v. Athens Armory*, Fed. Cas., No. 14, 473, pp. 884, 885 (1868).

⁴ *Ex parte Wells*, 18 How., 307, 310 (1855). See also *Baldwin v. Scoggin*, 15 Ark., 427, 431 (1855); *Ex parte Law*, Fed. Cas., No. 8, 126, p. 7 (1866); *Wood v. Fitzgerald*, 3 Ore., 568, 574 (1870).

⁵ *Ex parte Lockhart*, 1 Disney, 105, 107 (1855); *Ex parte Reno*, 66 Mo., 266, 269 (1877); *Ex parte Powell*, 73 Ala., 517, 519 (1883); *State v. Wolfer*, 53 Minn., 135, 138 (1893); *Ex parte Houghton*, 49 Ore., 232, 234 (1907); *Spencer v. Kees*, 91 Pac. (Wash.), 963, 965 (1907).

⁶ *Pleuler v. State*, 11 Neb., 547, 574 (1881). See also *Arthur v. Craig*, 48 Ia., 264, 268 (1878); *Woodward v. Murdock*, 124 Ind., 439, 442 (1890); *Ex parte Russell*, 92 N. Y. S., 68, 69 (1904); *In re Prout*, 12 Id., 494, 501 (1906).

established by judicial proceedings, that which has been done or suffered while they were in force is presumed to have been rightfully done and justly suffered."⁸ And, logically, the acceptance of a pardon⁹ confesses guilt.¹⁰ "The theory of pardon is preceded by confession of the imputed guilt."¹¹ "The pardon is granted on considerations which satisfy the executive that * * * an offender, though guilty, should be pardoned. * * * The pardon goes upon the presumption that the offender, if not already convicted, will be; else he would not need to plead his pardon to the indictment, but would be saved under his plea of not guilty."¹² "No doubt a clear case of innocence presents the strongest ground for the immediate remission of all the penalties of conviction. But that is not in practice the ground upon which pardons are or ought to be based, nor is it the ground upon which the pardoning power in a government is created and sustained. * * * A party is acquitted on the ground of innocence; pardoned through favor. And upon this very ground it is that the pardoning power is never vested in a judge. The effect as Montesquieu remarks, would be to confound all ideas of right, and render it impossible to tell whether a man was acquitted on the ground of innocence, or pardoned, though guilty, on the ground of mercy. * * * If the party convicted be innocent, nothing short of an utter abrogation of the sentence, restitution of all that he has paid, and compensation for all that he has suffered, can fill the measure of justice. Nothing of this sort is contemplated or effected by a pardon; the theory of innocence is as mischievous in its tendency as it is at war with the fundamental

⁷ *Roberts v. State*, 160 N. Y., 217, 221 (1899). See also Green, C. J., in *Cook v. Chosen Freeholders*, 26 N. J. L., 326, 331 (1857).

⁸ *Knote v. United States*, 95 U. S., 149, 154 (1877). See also *In re Greathouse*, Fed. Cas., No. 5, 741, p. 1060 (1864); *State v. Blalock*, 61 N. C., 242, 247 (1867); *Roberts v. State*, 30 N. Y. App. Div., 106, 109 (1898); 11 Op. Atty. Gen., 227, 228 (1865).

⁹ Only an effective pardon, of course, can so result. *Scott v. United States*, 8 Ct., Cl. 457, 460 (1872).

¹⁰ 3 Co. Inst., 239; *Rex v. Rudd*, Cowp., 331, 341 (1775); *State v. Carson*, 27 Ark., 469, 472 (1872); *Manlove v. State*, 153 Ind., 80, 81 (1899); *People v. Marsh*, 125 Mich., 410, 415 (1900); 11 Op. Atty. Gen., 227, 228 (1865). But some ancient decisions are to the effect that acceptance is only presumption of guilt. *Syer's Case*, 4 Coke 43 (1590); *Fines Case*, Godb., 288 (1623).

¹¹ *Grubb v. Bullock*, 44 Ga., 379, 382 (1871).

¹² *In re Greathouse*, Fed. Cas., No. 5, 741, p. 1060 (1864).

principles of government and the actual exercise of the pardoning power in this state.”¹³

But it has been impossible for the courts to avoid more practical considerations, and they have often admitted other grounds of pardon, although in many cases at the same time inconsistently maintaining, by implication at least, the theory of grace.

“It [pardon] proceeds upon the idea of innocence. The power is given to the executive to relieve against the possible contingency, under all systems of laws, of a wrongful conviction. And as all good governments are founded upon essential equity, the sovereign authority will not permit, so far as it can be prevented consistently with the maintenance of general laws, injustice to be done.”¹⁴ “It is, in effect, a reversal of judgment, a verdict of acquittal, and a judgment of discharge thereon. * * * Though sometimes called an act of grace and mercy, a pardon, where properly granted, is also an act of justice, supported by a wise public policy.”¹⁵ “The very nature and necessity of such an authority in every government arises from the infirmities incident to the administration of human justice.”¹⁶ “We can scarcely think it compatible with the genius of liberal government and free institutions, that there should be no shield to protect an individual against a tyrannical exercise by a judge of his power to punish for

¹³ Green, C. J., in *Cook v. Chosen Freeholders*, 26 N. J. L., 326, 331, 333, 335 (1857). See also *Cook v. Chosen Freeholders*, 27 N. J. L., 637, 642 (1858); *Curtis v. Cochran*, 50 N. H., 242, 245 (1870); *Roberts v. State*, 160 N. Y., 217, 221 (1899); 23 Op. Atty. Gen., 360, 370 (1901).

¹⁴ In matter of *Flourney*, 1 Ga., 606, 607 (1846).

¹⁵ *Knapp v. Thomas*, 39 Ohio St., 377, 381 (1883). See also *State v. Alexander*, 76 N. C., 231, 234 (1877).

¹⁶ *Ex parte Law*, Fed. Cas., No. 8, 126, p. 7 (1866). See also *United States v. Morris*, Fed. Cas., No. 15, 816, p. 1345 (1822); *Baldwin v. Scoggin*, 15 Ark., 427, 431 (1855); *Ex parte Wells*, 18 Wall., 307, 310 (1855); *Wood v. Fitzgerald*, 3 Ore., 568, 574 (1870); *Lee v. Murphy*, 22 Gratt, 789, 797 (1872); *State v. Baptiste*, 26 La. An., 134, 136 (1874); *State v. Rose*, 29 La. An., 755, 760 (1877); *Jones v. Board*, 56 Miss., 766, 770 (1879); *State v. Foley*, 15 Nev., 64, 69 (1880); *Young v. Young*, 61 Tex., 191, 193 (1884); *Diehl v. Rodgers*, 169 Pa. St., 316, 323 (1895); *Rich v. Chamberlain*, 104 Mich., 436, 441 (1895); *State v. Bowman*, 145 N. C., 452, 454 (1907). In *re Greathouse*, Fed. Cas., No. 5, 741, p. 1060 (1864), the court excepts “cases of illegal conviction,” etc., from the doctrine of pardon granted on the theory of guilt.

contempt—a hasty and petulant fiat of a judge.”¹⁷ But “the seeming inconsistency of allowing a discretion confided to the presiding judge, who hears the whole case upon sworn testimony, to be reviewed by the discretion of the Governor who acts upon *ex parte* statements, tends to show that it was contemplated that the power would be exercised sparingly, and only in extreme cases; for instance, if new matters should occur after the judgment.”¹⁸

Under the old common law pardons in case of improper conviction in the absence of provision for new trial,¹⁹ and in case of justifiable homicide,²⁰ were considered as “grantable of right,” or practically so; and according to the modern law an accomplice who “turns State’s evidence” is invariably saved by pardon or ex-

¹⁷ *State v. Sauvinet*, 24 La. An., 119, 121 (1872). The contrary view regarding pardon for contempt of court:—“It is a novel argument that there exists a prerogative in another department of the government—not by virtue of express law, but by reason of the apprehension that the courts will abuse their authority—to substitute its opinion for that of the courts, and to assume judicial functions, which do not belong to it, and to inquire into the legality of a conviction, and whether the judge acted properly, and with due regard to the rights of the defendant, in the trial of the case.” *Taylor v. Goodrich*, 40 S. W. (Tex. Civ. Ap.), 515, 523 (1897).

¹⁸ *State v. McIntire*, 1 Jones L. 1, 8 (1853). See also *Rich v. Chamberlain*, 104 Mich., 436, 441 (1895). It is held that in Louisiana there is such “ample opportunity for the judge, in the exercise of his legal discretion, so to temper justice with mercy as to make any commutation or interference with the sentence, short of an absolute pardon, not only unnecessary, but, in most cases, improper. The organic law of Louisiana, like that of the other states, has separated the powers of government into three distinct departments; and it is the peculiar province of the judiciary to ascertain the guilt of the accused, and to declare and impose the appropriate punishment; and interference by either of the other departments would, inevitably, tend to obstruct the proper administration of justice. If a convict merits any punishment, that which the law prescribes and the sentence imposes should be inflicted; if he does not deserve to be punished, he should be pardoned.” *State v. Rose*, 29 La. An., 755, 761 (1877).

¹⁹ Counsel, in *King v. Mawbrey*, 6 T. R., 619, 625 (1796); *People v. Comstock*, 8 Wend., 549 (1832); *King v. Oxford*, 13 East, 411, 416, note b. (1811); *Commonwealth v. Green*, 17 Mass., 514, 534 (1822); *Ball v. Commonwealth*, 8 Leigh, 726, 728 (1837).

²⁰ Post., 288; 2 Hawk. P. C., Ch. 37, sec. 1; *Knote v. United States*, 10 Ct. Cl., 397, 404 (1874).

emption from prosecution, although in strict theory his right is "equitable" only.²¹

The courts sometimes regard pardon as a kind of equity in the narrow sense. "The pardoning power * * * answers about the same purpose in the administration of criminal matters that equity does in the administration of civil matters. Equity supplies that wherein the law by reason of its universality is deficient; and pardons supply that wherein the criminal law by reason of its universality is deficient."²² This, in the opinion of *Hawkins*,²³ should act as a restraint upon the executive: "The law * * * seems to have intrusted the king with this high prerogative, upon the special confidence that he will spare those only whose case, could it have been foreseen, the law itself may be presumed willing to have excepted out of its general rules, which the wit of man cannot possibly make so perfect as to suit every particular case." "Pardons and remissions are in derogation of the law, and should never be extended except in cases which, could the law have foreseen, it would have excepted from its operation."²⁴

Reformation is also recognized as a ground of pardon,²⁵ and so is expiation of the offense.²⁶

All of these views which consider the merits of the individual are of course absolutely incompatible with the strict doctrine of grace. Moreover it is impossible to harmonize this doctrine with the modern idea of government by the people and for the people. "Mercy—divine attribute! often necessary to the best: sometimes

²¹ *E. g.*, *Rex. v. Rudd*, Cowp., 331, 336 (1775); *People v. Whipple*, 9 Cow., 707, 716 (1827); *Commonwealth v. Dabney*, 1 Rob., 696, 703 (1842); *Whiskey Cases*, 99 U. S., 594, 595 (1878). Cf. the ancient approvement. *E. g.*, *Rex. v. Rudd*, Cowp., 331, 334 (1775). In Texas the giving of such evidence has become a complete defense to indictment. *Bowden v. State*, 1 Tex. Ap., 137, 144 (1876); *Harden v. State*, 12 Tex. Ap., 186, 189 (1882); *Cameron v. State*, 32 Tex. Cr., 180 (1893).

²² *State v. Alexander*, 76 N. C., 231 (1877).

²³ Hawk. P. C., ch. 37, sec. 8, endorsed by *State v. McIntire*, 1 Jones L., 1, 4, 8 (1853).

²⁴ *State v. Leak*, 5 Ind., 359, 363 (1854). See also *Jones v. Board*, 56 Miss., 766, 770 (1879).

²⁵ *Young v. Young*, 61 Tex., 191, 193 (1884); *State v. Voss*, 80 Ia., 467, 469 (1890); *Rich v. Chamberlain*, 104 Mich., 436, 442 (1895). Denied in *Curtis v. Cochran*, 50 N. H., 242, 245 (1870).

²⁶ *State v. Smith*, 1 Bailey L., 283, 286 (1829); *People v. Potter*, 1 Park. Cr., 47, 55 (1846); *Ex parte Wells*, 18 Wall., 307, 310 (1855); *State v. Rose*, 26 La. An., 134, 136 (1874). Cf. 6 Op. Atty. Gen., 393, 403 (1854).

due to the worst: and, from the infirmities of our nature, always to be regarded when circumstances will admit of it. But how, in public concerns, this is to be accomplished with just attention to the general welfare, has, in every age, been a *desideratum* with statesmen and legislators. For, in human associations, other considerations, as well as the dictates of mercy, must be attended to. Compassion for the individual must frequently yield to the safety of the community. Society proceeds upon that principle. * * * The makers of the Constitution, considering that, although, in representative governments, the laws should be mild, they ought to be executed; and that, although a power to pardon, which had often been abused in England, should exist somewhere, it ought never to be exercised without proper cause, framed the clause," etc.²⁷ The pardoning power "cannot be treated as a privilege. It is as much an official duty as any other act. It is lodged in the Governor, not for the benefit of the convict only, but for the welfare of the people, who may properly insist upon the performance of that duty by him, if a pardon is to be granted."²⁸ "The power of pardon is founded on considerations of the public good, and is to be exercised on the ground, that the public welfare, which is the legitimate object of all punishment, will be as well promoted by a suspension as by an execution of the sentence."²⁹ Indeed the courts recognize the fact that at times pardon is extended wholly upon grounds of public policy with no regard whatever to the interests of individuals, as where the number of offenders is very great.³⁰ In short, "the grace of the people,"³¹ should be bestowed for the benefit of the people. But "grace" from this standpoint has no meaning. Neither delegated "grace," nor an abuse

²⁷ Pendelton, Pres., in *Commonwealth v. Caton*, 4 Call 5, 18 (1782). See also *State v. Leak*, 5 Ind., 359, 363 (1854); *State v. Dunning*, 9 Ind., 20, 23 (1857); *Wood v. Fitzgerald*, 3 Ore., 568, 574 (1870); *State v. Rose*, 29 La. An., 755, 761 (1877); *Rich v. Chamberlain*, 104 Mich., 436, 443 (1895).

²⁸ *Rich v. Chamberlain*, 104 Mich., 436, 441 (1895).

²⁹ Green, C. J., in *Cook v. Chosen Freeholders*, 26 N. J. L., 326, 333 (1857). See also *King v. Parsons*, 1 Show., 283, 284 (1691); Op. Justices, 13 Gray, 618, 621 (1859); *Lee v. Murphy*, 22 Gratt., 789, 797 (1872).

³⁰ Green, C. J., in *Cook v. Chosen Freeholders*, 26 N. J. L., 326, 332 (1857); *Waring v. United States*, 7 Ct. Cl., 501, 504 (1871); *In re Briggs*, 135 N. C., 118, 132 (1904).

³¹ *Ex parte Russell*, 92 N. Y. S., 68, 69 (1904).

of "grace,"³² nor "mercy" extended to one for the benefit of all, is thinkable.

It would seem that there are three causes of the persistence of the doctrine of "grace" in the courts. First, on account of the theory of the separation of powers it is difficult for the courts logically to justify the grounds upon which pardons are usually granted, and should be granted, in actual practice. Again, language suited to the theory of the personal rule of the absolute monarch has been retained in the modern democracy where the executive is but an agent of the sovereign. Last is the pervading influence of the analogy of "the divine attribute."

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³² Cf. "legitimate clemency." *Rich v. Chamberlain*, 104 Mich., 436, 443 (1895).